

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERNESTO SANTIAGO,
Plaintiff

v. CIVIL ACTION NO. 04-335 ERIE

UNITED STATES OF AMERICA,
Defendant

STATUS CONFERENCE

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Judge's Chambers, U.S. Courthouse, Erie,
Pennsylvania, on Friday, April 21, 2006.

APPEARANCES:

ERNESTO SANTIAGO, Plaintiff herein, (via Phone).

NEAL R. DEVLIN, Esquire, (via Phone), appearing
on behalf of the Plaintiff.

PAUL E. SKIRTICH, Assistant United States
Attorney, (via Phone), appearing on behalf of
the Defendant.

DIANA LEE, Deputy Regional Counsel, (via Phone),
Federal Bureau of Prisons.

Ronald J. Bench, RMR - Official Court Reporter

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1 PROCEEDINGS

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3 (Whereupon, the proceedings began at 10:06 a.m., on
4 Friday, April 21, 2006, in Judge's Chambers.)

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6 THE COURT: Now, let's go around the horn here --
7 Mr. Santiago?

8 MR. SANTIAGO: I'm present.

9 MR. DEVLIN: Neal Devlin here.

10 MS. LEE: Diana Lee, agency counsel for the Bureau
11 of Prisons.

12 MR. SKIRTICH: Paul Skirtich, and with me is
13 Attorney Phil O'Connor from our office.

14 THE COURT: Okay. Just to set the stage for this,
15 by way of background the defendant had filed a motion for
16 summary judgment and supporting brief back in December --
17 actually, I think on December 23rd of '05. Based in part on
18 the plaintiff's failure to have obtained a medical expert in
19 support of his Federal Tort Claims Act claim, which essentially
20 alleged negligence with respect to the treatment of a staff
21 infection. Shortly thereafter, our chambers contacted the Knox
22 firm in an attempt to enlist Mr. Lanzillo to see if he would be
23 willing to enter an appearance on behalf of Mr. Santiago for
24 the purpose of exploring or attempting to obtain an expert
25 report. By motion dated March 2nd of '06, Mr. Lanzillo filed a

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1 motion for extension to submit an expert report, indicating
2 that he thought the review could be completed by April 15th.
3 All right, Mr. Devlin, where are we now?

4 MR. DEVLIN: Your Honor, we have submitted all of
5 the medical records and having engaged an expert, and we did
6 speak to that expert, unfortunately, we are not going to be
7 able to call that expert and we're not able to obtain an

8 opinion from that expert. They did do a review, having gone
9 through the normal due diligence -- in getting them all the
10 information they needed. However, we are not going to be in a
11 position to submit a report. We would not intend to call this
12 expert at trial, which I haven't given you the name. And based
13 upon our inability to get that report, your Honor, which we
14 already discussed with Mr. Santiago, we would be requesting we
15 be allowed to withdraw as counsel because without that report,
16 we don't believe we can continue in this case.

17 THE COURT: Would it be accurate to say that when
18 you say you were unable to obtain an expert report, you were
19 unable to obtain a favorable expert report, is that what you
20 mean?

21 MR. DEVLIN: Your Honor, we were unable to obtain a
22 report, yes, your Honor, that is what we mean.

23 THE COURT: You were unable to obtain a report that
24 substantiated the allegations of medical malpractice, is that
25 essentially it?

1 MR. DEVLIN: Your Honor, yes. I hesitate to say

2 because I'm not sure, obviously, what Mr. Santiago plans on
3 doing in going forward. But using all the due diligence we
4 could, that is accurate, your Honor.

5 THE COURT: You have discussed this with Mr.
6 Santiago, is that correct?

7 MR. DEVLIN: Yes, your Honor.

8 THE COURT: Mr. Santiago, do you understand what Mr.
9 Devlin has just been saying?

10 MR. SANTIAGO: Yes, I understand everything. I
11 spoke to Mr. Devlin and Ms. Watson about myself trying to
12 get -- I'm no longer in segregation. Mr. Devlin said we're
13 going to file a motion to withdraw, I was waiting to hear from
14 that. I would ask this court to give me 60 days to get my own
15 report from an expert, now that I'm no longer in segregation I
16 can write and call people more freely. I probably will be
17 asking Barbara Zeller, who wrote the warden at FCI McKean, to
18 give her report.

19 THE COURT: Who is Barbara Zeller?

20 MR. SANTIAGO: She's part of the exhibits, where she
21 wrote -- she's a medical doctor out of New York, she wrote the
22 warden saying I should have gotten more tests, that was
23 ignored, that was part of my exhibit. It's in the complaint as

24 well.

25 THE COURT: All right. Off the top of my head, I am

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1 unfamiliar with this particular letter, do you know what he's

2 talking about, Mr. Skirtich?

3 MR. SKIRTICH: I do. This is a letter that Dr.

4 Zeller wrote to the warden -- I don't have it in front of me,

5 judge.

6 THE COURT: What is the upshot of the letter, what

7 does she say?

8 MR. SANTIAGO: I have a copy if you want.

9 MR. SKIRTICH: She talks in general about treatment.

10 She never saw Mr. Santiago, nor did she view any of the medical

11 records.

12 MR. SANTIAGO: I did forward her a copy of the

13 medical records.

14 THE COURT: Is this letter the functional equivalent

15 to an expert report?

16 MR. SANTIAGO: I have it right here.

17 THE COURT: I'm not speaking to you right now, Mr.

18 Santiago.

19 MR. SANTIAGO: Okay.

20 MR. SKIRTICH: Respectfully, judge, no. Because

21 there's no opinion as to the standard of care or the treatment

22 given by the prison medical staff or the private dermatologist

23 in New York. I'm not even sure, I heard Mr. Santiago, I

24 respect what he represented, your Honor, but I'm unsure what

25 exactly Dr. Zeller wrote. She does research, I believe, at

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1 Columbia University in New York. I'm not aware that she saw

2 the medical records in this case.

3 THE COURT: Let me ask Mr. Devlin, are you familiar

4 with this letter he's talking about?

5 MR. DEVLIN: Your Honor, I'm generally familiar with

6 it. I do not have it right in front of me. I know we reviewed

7 that and were aware of that. We determined -- that we needed a

8 different medical professional, we felt we needed an additional

9 letter to this. I wish I had the letter in front of me, I

10 apologize for not having that.

11 THE COURT: I don't have it in front of me, either.

12 MR. SANTIAGO: Your Honor, if I may.

13 THE COURT: No, you may not. You may when I tell
14 you. Back to Mr. Devlin again. Is that letter, would that
15 letter, I guess I'm asking a question that's somewhat unfair,
16 I don't have it in front of me -- do you have an opinion as to
17 whether that letter would suffice as an expert report?

18 MR. DEVLIN: Your Honor, let me answer that this
19 way, if I may. We believed that it was not sufficient, that we
20 needed something in addition. I don't want to speak to the
21 court if Mr. Santiago were to choose to submit that. I just
22 was handed a copy of the letter, I do not believe that Dr.
23 Zeller renders any opinions in a way that you would normally
24 see them in an expert report. That's the reason why we went to
25 someone with whom we were more familiar in an attempt to do

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1 that.

2 THE COURT: Let me go to Mr. Santiago. How many
3 days, I couldn't hear you the first time, Mr. Santiago, how
4 many days are you asking for to obtain and file an expert
5 report?

6 MR. SANTIAGO: Okay, I would ask for 60 days.

7 THE COURT: And from whom are you going to attempt
8 to obtain an expert report?

9 MR. SANTIAGO: I'm going to contact Barbara Zeller.
10 She was the one that wrote the letter to the warden. I have
11 that letter in front of me. She was doing studies on the same
12 infection I had. She mentioned it in the letter. The letter
13 is Exhibit C31-A, I could use that letter as an expert report.

14 MR. SKIRTICH: Judge, if I may.

15 MR. SANTIAGO: That letter explains everything. It
16 says they are currently the site of a study, on the same
17 infection that I had, at Columbia University. She says in that
18 letter that she is the director of the long-term care facility
19 there.

20 THE COURT: How long is the letter, is it one page?

21 MR. SANTIAGO: It's two pages.

22 THE COURT: Mr. Skirtich, do you have a copy of that
23 letter in front of you?

24 MR. SKIRTICH: I do.

25 THE COURT: Mr. Skirtich, would you be so kind as to

1 read it, at least the pertinent part to me, and slowly for the
2 court reporter, so I can make an independent determination now
3 as to whether that suffices as an expert report?

4 MR. SKIRTICH: Yes. The letter is dated January 2,
5 2004. And it's addressed to the warden at McKean. It starts
6 "I'm writing concerning the medical condition of Mr. Ernie
7 Santiago. I was asked by his family to review his medical
8 records from McKean and offer any expert advice. I am
9 currently the medical director of a long-term care facility for
10 immune suppressed people, and have been frequently confronted
11 with how to handle staphylococcal infections in this communal
12 setting. We are currently the site of a study of resistant
13 staphylococcus infections in collaboration with Columbia
14 University.

15 I received medical records for Mr. Santiago dating
16 from 4/15/03 until 11/14/03. The family was concerned about
17 non-healing sores on his lips that began in August 2003.

18 From the records, Mr. Santiago has a history of
19 longstanding eczema, which flared in late July. In early
20 August he had sores on his lips and swelling around the left

21 eye. I explained to the family that from the records, the
22 diagnosis then and the medical care seemed thorough and
23 appropriate in this period. He was evaluated and treated for
24 both herpes and bacterial infection and cultured for both. The
25 etiology was found to be staphylococcus aureus, sensitive to

1 many antibiotics and resistant only to penicillin and
2 erythromycin. He received appropriate antibiotics and
3 improved. But worsened again on 8/18, and was treated with
4 another antibiotic, Cipro, on 8/26. This did not resolve the
5 symptoms and he was referred to an outside dermatologist, who
6 recommended appropriate interventions to determine if he was a
7 chronic nasal carrier of this bacterium and to try to eliminate
8 the infection with Bactoban. His nasal culture was negative.

9 However, the problem flared again in November with a
10 fever, eye swelling, and a purulent discharge from his lips.
11 This time he was treated with erythromycin, which was not the
12 correct choice because according to the prior culture, the
13 staph aureus would not be sensitive to this medication."

14 THE COURT: Read that sentence to me again, please?

15 MR. SKIRTICH: "This time he was treated with
16 erythromycin, which was not the correct choice because
17 according to the prior culture, the staph aureau would not be
18 sensitive to this medication.

19 There were no further medical records. However, the
20 family is worried because Mr. Santiago reports that he has not
21 improved and photos of him apparently show that he has not
22 improved. In the photo, he had visible swelling around one eye
23 and sores on his lips. I would be concerned that Mr. Santiago
24 has a more resistant strain of staphylococcus aureus.
25 According to the family, he was treated for a lung infection

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1 last summer with vancomycin, intravenously. This medication is
2 used for resistant organisms.

3 It is possible that Mr. Santiago has developed a
4 more resistant strain since the culture was obtained in August.

5 It would be important to repeat the culture of the
6 wounds, and blood cultures if he continues to have fevers. If
7 he has more resistant staphylococcus, he most likely will need
8 to be hospitalized to receive intravenous medication.

9 There are infection control issues to be considered if he
10 carries resistant staphylococcus. We isolate such cases until
11 the infection has cleared in order to avoid spread to other
12 individuals.

13 Hopefully, by now he has improved and these are not
14 current concerns." Signed Dr. Barbara Zeller.

15 THE COURT: All right. Having heard the letter, in
16 my opinion that does not suffice as an expert report. Because
17 the physician does not detail those instances where she finds a
18 deviation from the accepted standard of care, nor does she
19 express her opinions, although, it's more of a factual
20 narrative. But to the extent anything could be viewed as an
21 opinion, it's not expressed to a reasonable degree of medical
22 certainty. It's simply, in my view, more of a medical
23 narrative as to what she believes may have been going on.
24 Plus, it doesn't appear she had or has all the records.

25 All right, so now we're back to you, Mr. Santiago.

1 When I say a medical expert report and this is for your benefit
2 in writing or speaking with the doctor, it will be necessary

3 for her to detail those instances, if she can, in which she
4 finds that the medical care that you received for your
5 infection fell below the accepted standard of care, number one.
6 Do you understand that?

7 MR. SANTIAGO: Okay, yes.

8 THE COURT: And, number two, it is necessary in the
9 expert report for her to express her opinions about the
10 deviation from the accepted standard of care to a reasonable
11 degree of medical certainty.

12 MR. SANTIAGO: To express an opinion -- can you say
13 that again, please?

14 THE COURT: I'm going to get you a copy of this
15 transcript. It will be the best evidence as to what I said.
16 And then it's also necessary that a medical expert express an
17 opinion on causation. And that is whether or not, if there was
18 medical malpractice, it resulted in injury or damage to you
19 that would not have been sustained but for the medical
20 malpractice.

21 Finally, medical experts are, in general, restricted
22 in their testimony to the four corners of the expert report.
23 So if she's going to produce an expert report, it's important
24 that she include in it everything that she would propose to

25 testify to.

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1 Now, that having been said, this is what I'm going
2 to do. I have been down this road before recently in a case
3 called Nyhaus, N-y-h-a-u-s, versus United States. I don't
4 remember if you were in that or not, Mr. Skirtich?

5 MR. SKIRTICH: I was not, Jessica Smolar was.

6 THE COURT: But, in any event, I am going, first of
7 all, with respect to Mr. Devlin, I appreciate the firm's
8 efforts, I'm going to grant your motion to withdraw on the
9 record, so you are now out. As a matter of fact, you are
10 welcome to stay on the line, but you're also welcome not to
11 stay on the line.

12 MR. DEVLIN: I'd be happy to stay on the line, your
13 Honor.

14 THE COURT: And, Mr. Santiago, I am going to give
15 you 60 days from today within which to file an expert report
16 consistent with the parameters I discussed with you on the
17 phone a moment ago. I think that's a reasonable amount of
18 time.

19 In the event -- I want to make that very clear on
20 the record -- in the event the expert report is not filed after
21 60 days, at that point, in light of the fact that the Knox firm
22 had attempted to obtain an expert through really the court's
23 intercession, and was unable to do so, in the event that that
24 report, your report, is not produced in 60 days, there will be
25 no further extensions for any circumstances and the case will

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1 be dismissed. Let make it clear, summary judgment will be
2 granted in favor of the defendant and the case will be
3 dismissed with prejudice on the basis that you cannot proceed
4 in a medical malpractice case under Pennsylvania law without an
5 expert. Do you understand that?

6 MR. SANTIAGO: Yes.

7 THE COURT: All right. Is there anything further,
8 Mr. Skirtich?

9 MR. SKIRTICH: There's one thing, judge, for the
10 record. Just so it's complete and you know. On January the
11 12th, 2004, a two-page detailed letter was sent to Dr. Zeller
12 by the warden at FCI McKean. Where he recounted all of the

13 treatment that he had received up until that date. At the end
14 of that letter it was indicated that was if Dr. Zeller required
15 any other additional information, that she had free access to
16 it as long as she called or wrote or contacted. And to this
17 day Dr. Zeller never contacted the Bureau of Prisons.

18 THE COURT: Was it initially the warden going in
19 search of --

20 MR. SKIRTICH: No, it was in response to the letter
21 I just read to you.

22 THE COURT: Okay.

23 MR. SKIRTICH: And that letter was given to Mr.
24 Santiago, and it is in his documents he filed with the court,
25 so I know he has it and is aware of it.

14

1 MR. SANTIAGO: Can I say something, your Honor?

2 THE COURT: Yes.

3 MR. SANTIAGO: Just because Mr. Skirtich mentioned
4 that, I do have the letter in front of me, I spoke to Mr.
5 Skirtich at our deposition, that had conflicted, as I showed
6 him, it mentioned I got medication after I came from the

7 dermatologist on one day, which was in fact not true. It was
8 not signed by the warden, it was signed by the assistant
9 warden, who was acting warden because the warden was leaving.

10 THE COURT: Those may or may not be issues for
11 another day. Mr. Santiago, the most important issue on the
12 front burner right now is to get your expert report.

13 Mr. Skirtich, may I assume you want a copy of this
14 transcript?

15 MR. SKIRTICH: Yes, your Honor.

16 THE COURT: Then my court reporter will prepare one
17 and send it out. Thank you, very much.

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19 (Whereupon, at 10:31 a.m., the proceedings were
20 concluded.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a
6 correct transcript from the record of proceedings in the
7 above-entitled matter.

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12 Ronald J. Bench

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